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In The

Supreme Court of the United States

O&G INDUSTRIES, INC.,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF

JEFFREY A. BLUEWEISS
BAI, POLLOCK, BLUEWEISS & MULCAHEY
One Corporate Drive
Shelton, CT 06484
(203) 925-8100

MICHAEL S. TAYLOR
Counsel of Record
KIMBERLY A. KNOX
WESLEY W. HORTON
BRENDON P. LEVESQUE
HORTON, SHIELDS & KNOX, P.C.
90 Gillett Street
Hartford, CT 06105
(860) 522-8338

Counsel for Petitioner O&G Industries, Inc.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

LIST OF PARTIES

Petitioner's list of parties was set forth at page ii of its Petition for Writ of Certiorari, and there are no amendments to that statement.

CORPORATE DISCLOSURE STATEMENT

Petitioner's corporate disclosure statement was set forth at page iii of its Petition for Writ of Certiorari, and there are no amendments to that statement.

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REPLY

What is clear in this case, and what the Respondent does not dispute, is that the Second Circuit's pre-emption ruling will have a far reaching effect on the laws of all of the States in which Amtrak operates. Within the context of this case, the Second Circuit has given Amtrak the broad and sweeping power to nullify Connecticut's traditional control over the safety of Connecticut construction sites, even though Congress specifically rejected an express grant of such authority (see, infra, p. 6). Beyond this case, the decision establishes a unique and dangerous precedent: that a generic grant of congressional authority, without more, can demonstrate the clear and manifest congressional intent necessary to supplant state law.

The Second Circuit's decision removes all meaningful incentive for Amtrak to promote safe practices at construction sites located on Amtrak property, because Amtrak may pass along the consequences of its negligent conduct without fear of state regulation or limitation. Indeed, even the States themselves will now be required to hold Amtrak harmless for any injury or damage it may cause, or face the possibility that Amtrak will refuse to grant access to Amtrak property to perform necessary repairs and improvements to the countless highway bridges, power lines, sewer lines and other infrastructure components that intersect Amtrak's railroad tracks. As a result, Amtrak now can essentially hold the safety of these major elements of our national infrastructure hostage

to its desire to protect itself from the consequences of its own bad acts.

Petitioner respectfully submits that Congress did not intend to give Amtrak so much power over the States and that the Second Circuit's ruling is in acute conflict with the pre-emption jurisprudence of this Court. Given the importance of the federal pre-emption question, and the far reaching scope of the Second Circuit's decision, a grant of certiorari is warranted in this case in order to preserve and protect the indispensable sovereignty of the States.

I. Congress did not intend to elevate Amtrak's financial concerns over the safety of Amtrak's operations

According to the Respondent, when Congress passed the 1997 Reform Act, it was so overwhelmingly concerned with Amtrak's financial straits that it intended to invalidate any state laws – including laws designed to promote public safety – that could limit Amtrak's ability to contract away the consequences of its own negligence. Congress did this, says the Respondent, in order to protect Amtrak from "significantly higher outlays in settlements and judgments." Respondent's Brief in Opposition ("RBO") 16, 17-18. But several factors demonstrate that the Respondent is wrong.

First, the Reform Act specifically limited Amtrak's exposure for passenger claims to $200 million per claim, but placed no such limitation on non-passenger

claims like the ones underlying this case. If Congress truly was concerned about the financial effect of non-passenger claims on Amtrak's bottom line, Congress would have placed a similar limitation on Amtrak's exposure to them.

The $200 million cap for passenger claims is important for another reason. Contrary to the Respondent's position, the legislative history of the Reform Act shows quite clearly that both Congress and Amtrak were exclusively concerned with Amtrak's exposure to large passenger claims, and that they expressed no concern over the type of non-passenger claims at issue here. In spite of its serious financial concerns, Congress specifically left Amtrak exposed to damages from passenger claims in the amount of $200 million per accident. It is difficult to reconcile that substantial exposure to passenger claims – the claims Congress was most concerned about – with Respondent's argument that Congress intended to protect Amtrak from *any* exposure to the claims in this case – claims Congress expressed no concern about at all. Congress simply did not express any intent that would warrant such a drastic conclusion.

Amtrak's substantial exposure to damages from passenger claims also reflects Congress' understanding of the effect of tort litigation on the promotion of safety. In its recent decision in *Wyeth v. Levine*, 555 U.S. ___, 2009 WL 529172 (2009), a case concerning the pre-emption of state tort actions alleging insufficient drug labeling, this Court recognized that state

tort actions "further consumer protection by motivating manufacturers to produce safe and effective drugs . . . " *Id.*, at *10. Also, state "tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risk promptly." *Id.*, at *12.

Similarly, state-law tort claims against Amtrak promote the safe operation of trains and safe practices on premises owned by Amtrak adjacent to its tracks. If Amtrak can avoid all liability for damages caused solely by its own negligence, then Amtrak will have no incentive to engage in safe practices in order to avoid those damages. Although Respondent makes a reference to federal fines that may be imposed on Amtrak for violations of federal safety regulations (RBO 22) (an observation that also applies to drug companies), there is no suggestion in the record that any such fines are applicable in this case or that any such fines were actually levied against Amtrak. Even if fines were levied, relatively small fines cannot possibly have the same deterrent effect as a tort action with potential exposure of $200 million. Under the Second Circuit's construction of 49 U.S.C. § 28103(b), that substantial deterrent, along with the safety practices it encourages, is eliminated.

II. Congress specifically elected *not* to include an express pre-emption provision in 49 U.S.C. § 28103(b)

Although Congress has enacted several provisions that expressly pre-empt state laws with respect to Amtrak, it specifically chose not to include express pre-emptive language in 49 U.S.C. § 28103(b). Express statements of pre-emption may be found, for example, in 49 U.S.C. § 24301(g), exempting Amtrak from state laws related to rates, routes, or service, 49 U.S.C. § 24301(h), pre-empting certain state laws concerning pay periods, 49 U.S.C. § 24301(i), pre-empting certain state laws concerning employee work requirements, 49 U.S.C. § 24301(j), which pre-empts laws concerning the joint use of facilities, and 49 U.S.C. § 28103(a) (contained within the same statute as the provision at issue in this case), which pre-empts state punitive damage laws in certain cases.

Respondent argues that Congress' whole purpose in passing 49 U.S.C. § 28103(b) was to prevent state laws from interfering with Amtrak's ability to seek indemnification. Specifically, Respondent claims that Congress intended to permit Amtrak to "enter into contracts allocating responsibility for claims *without regard to any laws that might otherwise impair or nullify such arrangement*" (emphasis added) RBO 10; and that Congress' clear purpose and intent was that Amtrak's indemnification agreements would be "enforceable *notwithstanding any law or public policy*" (emphasis added) RBO 16. It is difficult to reconcile such a purpose with the fact that, in spite of all of the

explicit statements of pre-emption that Congress included in the Amtrak Act, Congress did not include any express pre-emption statement in 49 U.S.C. § 28103(b).

Even more compelling is the fact that Congress *considered* including an express pre-emption statement in 49 U.S.C. § 28103(b) but chose not to do so. In its original form, subsection (b) contained pre-emptive language very similar to that found in subsection (a), providing as follows:

> Indemnification Obligations. Obligations of any party, however arising, including obligations arising under leases or contracts or pursuant to orders of an administrative agency, to indemnify against damages or liability for personal injury, death, or damage to property described in subsection a) incurred after the date of the enactment of the Amtrak Reform and Privatization Act of 1997, shall be enforceable, *notwithstanding any other statutory or common law or public policy*, or the nature of the conduct giving rise to the damages or liability.

S. 738, 105th Cong. § 161 (1997) (emphasis added). Of course, as passed, 49 U.S.C. § 28103(b) simply states that "a provider of rail passenger transportation may enter into contracts that allocate financial responsibility for claims."

What is clear, therefore, is that the language in Respondent's brief is Respondent's language, not the

language ultimately adopted by Congress. It is language Congress used elsewhere in statutes dealing with Amtrak, demonstrating that Congress has the ability to pre-empt when it intends to pre-empt, but it is language Congress specifically chose not to use in 49 U.S.C. § 28103(b). Although the absence of an express statement of pre-emption is not dispositive of the implied pre-emption question, see, e.g., *Geier v. American Honda Motor Co.*, 529 U.S. 861, 867-74 (2000), the fact that Congress specifically considered and rejected an express statement of pre-emption here is strong evidence that Congress did not intend 49 U.S.C. § 28103(b) to have the pre-emptive power the Second Circuit has given it.

III. The legislative history of 49 U.S.C. § 28103(b) does not support pre-emption

A possible explanation for the fact that Respondent expresses one congressional intent while 49 U.S.C. § 28103(b) expresses another is that Respondent cites to legislative statements about the *prior*, and very *different*, version of the statute. In its brief, Respondent relies heavily on House Committee Report No. 105-251 for the statement that:

> The bill . . . affirms that indemnity contracts between a passenger rail operator and any other party are fully enforceable without regard to any other law or public policy.

RBO 14, 19, citing App. 117. Respondent also relies on Senate Committee Report No. 105-85 to argue that

Congress was not only concerned with agreements between Amtrak and freight railroads, but agreements with "other parties" as well. RBO 15-16, 18, citing App. 148, 155-56.

What is critically important, however, is that both H.R. Rep. 105-251 and S. Rep. 105-85 refer to the *earlier version* of the Reform Act. As set forth above, that earlier version of H.R. 2247 and S. 738 contained dramatically different indemnification language which ultimately was not approved by Congress. It provided, in relevant part, as follows:

> Indemnification Obligations. – Obligations of *any party*, however arising, . . . to indemnify against damages or liability for personal injury, death, or damage to property . . . shall be enforceable, *notwithstanding any other statutory or common law or public policy*, or the nature of the conduct giving rise to the damages or liability.

(Emphasis added). Obviously, the legislative statements relied on by Respondent are direct references to the nearly identical language of the Act as it existed at the time. That precise language, however, *was omitted by Congress* before it passed the final version of the Reform Act. The only intent expressed by that chain of events is the intent of Congress *not to* imbue the statute with the pre-emptive force that Respondent and the Second Circuit believe it has.

To the extent that the legislative history of 49 U.S.C. § 28103(b) contains any specific discussion

about indemnification (which was not Congress' primary concern in passing the Reform Act), it describes only the concerns of Amtrak and the freight railroads on which Amtrak operates. Taken in context, the following legislative statements demonstrate Congress' real concerns:

> The bill also resolves an issue of long-standing concern to Amtrak and to the freight railroads over which Amtrak operates and removes a major barrier to the expansion of passenger rail service – exposure to tort liability from passenger train accidents. This exposure results from the usually involuntary participation of the freight railroad as a provider of facilities and infrastructure.

App. 117.

* * *

> Reforms to Amtrak's liability arrangements with freight railroads are tied directly to Amtrak's financial situation. The current liability arrangement leaves the freight railroads, over whose tracks Amtrak operates by law, potentially exposed to the full cost of a passenger rail accident.

App. 123.

* * *

> [A]fter the 1987 Chase, Maryland, accident involving the collision of an Amtrak train and a Conrail freight locomotive, the [district

> court] ruled that enforcement of the indemnification agreement between Amtrak and Conrail would violate public policy. . . . This avoided a large taxpayer-funded expense in the short term, but in the long run convinced the entire freight industry that the indemnity agreements offered no real legal protection.

App. 124.

* * *

> Amtrak and the freight railroads believe legislation is necessary to confirm enforceability of the indemnification agreements they have entered into regarding operation over each others' rail lines. . . . As long as there is the possibility that state laws governing indemnification contracts may make *these contracts* unenforceable, Amtrak and a freight railroad may find themselves litigating with each other.

(Emphasis added). App. 148.

In other words, the freight railroads, required by federal law to allow Amtrak to use their tracks, were concerned that they would also be required to bear the costs of Amtrak's negligence. They were worried that their indemnification agreements might be invalidated, leaving them exposed to large passenger claims caused by Amtrak's negligence even though they were not voluntarily allowing Amtrak to use their tracks. This was the *only* specific concern about

indemnification that Amtrak expressed or that Congress considered during the adoption of the Reform Act.

The Second Circuit failed to recognize this specific intent when it found a conflict between Connecticut law and 49 U.S.C. § 28103(b). By way of contrast, this Court's decision in *Geier* is an example of the level of Congressional intent necessary to invoke implied pre-emption. In *Geier*, the Court found that a state tort action premised on the requirement that certain vehicles be equipped with airbags was pre-empted by a Department of Transportation safety standard that specifically contemplated a range of safety options for motor vehicle manufacturers.

Closely analyzing the Department's historic treatment of the issue, this Court concluded that the "deliberate mix" of safety alternatives was based upon a series of careful and specific considerations regarding the best means to achieve safer motor vehicle standards that would be accepted by the public. See *Geier*, 529 U.S. at 878-882. The Second Circuit did not conduct a similarly careful analysis of the legislative history here, and Congress made no such careful legislative consideration with respect to Amtrak's right to indemnification.

IV. Presumption against pre-emption

Finally, Respondent argues that the Second Circuit's failure even to consider the presumption against pre-emption is irrelevant because the court

found that the state and federal laws at issue in this case were in conflict. RBO 23. In its most recent decision on implied pre-emption, however, this Court once again emphasized the importance of the presumption against pre-emption:

> [i]n all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'

Wyeth, 555 U.S. ___, 2009 WL 529172, at *5, quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (additional citation omitted).

Wyeth went on to observe that this Court has long held that the presumption against pre-emption applies to claims of implied conflict pre-emption as well as claims of express pre-emption. *Wyeth*, 2009 WL 529172 at *5, n.3, citing *California v. ARC America Corp.*, 490 U.S. 93, 101-102 (1989); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 716 (1985); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 387 (2002). In the same footnote, the Court responded to Wyeth's argument that a long history of federal regulation made the presumption against pre-emption inapplicable. The Court explained that the presumption does not rely on the absence of federal regulation, and that Wyeth's argument, "misunderstands the principle: We rely on the

presumption because respect for the States as 'independent sovereigns in our federal system' leads us to the conclusion that 'Congress does not cavalierly pre-empt state-law causes of action.'" *Wyeth*, 2009 WL 529172, at *5, n.3, quoting *Lohr*, 518 U.S. at 485.

Here, the Second Circuit has ignored the presumption, summarily finding pre-emption without any clear and manifest expression of intent by Congress (and in the face of Congress' decision not to pre-empt state laws expressly). Because the Second Circuit's overbroad decision conflicts with the pre-emption jurisprudence of this Court and has the potential to support findings of pre-emption where Congress did not so intend, a grant of certiorari is warranted in this case.

CONCLUSION

Because this case presents a substantial question of state sovereignty, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

JEFFREY A. BLUEWEISS
BAI, POLLOCK, BLUEWEISS & MULCAHEY
One Corporate Drive
Shelton, CT 06484
(203) 925-8100

MICHAEL S. TAYLOR
Counsel of Record
KIMBERLY A. KNOX
WESLEY W. HORTON
BRENDON P. LEVESQUE
HORTON, SHIELDS & KNOX, P.C.
90 Gillett Street
Hartford, CT 06105
(860) 522-8338

Counsel for Petitioner